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CONDITIONAL SALES AND CHATTEL MORTGAGES*

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NOTICE, FILING AND RECORDATION

In order for either type of instrument to be valid except as between the parties, or those with actual notice, the instrument must be filed.

Actual notice is, of course, sufficient without filing, as to purchasers and encumbrancers and subsequent creditors, and where a bill of sale recited "subject to a first mortgage of $12,300" this was held sufficient notice of a conditional sale where the balance due was the same amount.[51]

An exception to the rule requiring filing exists in the case of a conditional sale made in a state where filing is not required, and the property moved into the State of Washington without the consent of the vendor.[52]

A conditional sale contract must be filed within ten days of the delivery of possession of the chattels, in the county of the residence of the vendee.[53] Where the vendee is a corporation, it must

* Continued from last issue.

[51] *Merrick v. Neeley*, 143 Wash. 588, 255 Pac. 936 (1927) *Wittler Corbin Mach. Co. v. Martin*, 47 Wash. 123, 91 Pac. 629 (1907). See also Allis-Chalmers *Mfg. Co. v. Ellensburg*, 108 Wash. 533, 185 Pac. 811 (1919).

[52] *Rodecker v. Jannah*, 125 Wash. 137, 215 Pac. 364 (1923). See also note 43, *supra*. See also *Sound Ind. Loan Co. v. Allyn*, 149 Wash. 123, 270 Pac. 295 (1928), where court said if vendor consents to removal or delays too long in complying with the laws of Washington after knowledge of removal, the title is lost except as between the parties.

[53] Rem. Revised Stats., Sec. 3790, as amended 1933: That all conditional sales of personal property, or leases thereof, containing a conditional right to purchase, where the property is placed in the possession of the vendee, shall be absolute as to all *bona fide* purchasers, pledgees, mortgagees, encumbrancers and subsequent creditors, whether or not such creditors have or claim a lien upon such property, unless within ten days after the taking of possession by the vendee, a memorandum of such sale, stating its terms and conditions and signed by the vendor and vendee, shall be filed in the county auditor's office of the county, wherein, at the date of the vendee's taking possession of the property, the vendee resides. Every such contract for the conditional sale or lease of any personal property, except machinery, apparatus or equipment to be used in manufacturing or industrial purposes, attached to or to be attached to a building, whether a fixture at common law or not, shall be absolute as to all subsequent purchasers or encumbrancers of such building and the land on which it stands, unless such contract or lease shall also contain a sufficienet legal description of the real estate which said building occupies and shall be filed and recorded as provided in sec. 3791 of this act.

be filed in the county designated as its headquarters by its articles of incorporation.[54] and not in the county where the chattel is to be kept or used as in the case of a chattel mortgage, nor yet in the county where in fact its principal business is transacted unless that is the county designated in its articles of incorporation.[55]

As revised in 1933, the statute provides for the recordation of a conditional sale of property (except machinery, etc. in a plant) where it is to be attached to real property, whether a fixture at common law or not, and this record is to be made where an instrument affecting such real property would be filed for record. In the case of a corporation-vendee, this would modify the above statements. In a case decided the same year under the former statute which contained no such provision, the court avoided the constructive notice arising from the filing of a conditional sale of property which was installed in a residence to be sold as a furnished home, on the grounds that the vendee had an implied power of sale to sell the furniture and equipment with the residence.[56]

The statute makes no provision for renewing the record and the writer has found no case which would indicate whether it would operate to give constructive notice indefinitely, or whether the statute of limitations relating to contracts or the one relating to recovery of personal property would be applied to a vendor's action to recover the chattel, or if either applies, when it would commence to run.

An assignment of the vendor's interest as security may be filed and the filing will constitute constructive notice to creditors, subsequent purchasers and encumbrancers.[57] But if the assignment is absolute and not given as security, there is no provision for filing, and filing does not operate as constructive notice.[58]

A third party dealing with the chattel is charged with the knowledge he would have obtained in prosecuting inquiries suggested by the filing. Thus an engine was sold under a contract inaccurately describing it, and stating that it was to be filed in W County, in fact it was never taken there but was installed in another county, the contract was filed in a third county which was the residence of

[54] *Casey Hedges Co. v. Wilcox*, 72 Wash. 605, 131 Pac. 205 (1913).

[55] *Buckner-Weatherby Co. v. Wuest*, 167 Wash. 647, 9 Pac. (2d) 1104 (1932).

[56] *Schoenfield v. Wilson*, 175 Wash. 201, 27 Pac. (2d) 564 (1933).

[57] Rem. Rev Stats. 3791-1.

[58] *Flynn v. Garford Motor Truck Co.*, 149 Wash. 264, 270 Pac. 806 (1928). Though the assignment is absolute in form, it may be shown to be for security only. *Thayer v. Yakima Tire Co.*, 116 Wash. 299, 199 Pac. 234 (1921). See also *General Motors Acceptance Corp. v. Arthur* 118 Wash. 593, 204 Pac. 194 (1922).

the corporation, it was held sufficient notice, because the vendee at no time had any other engine of that character.[59] In another case, upholding a contract which described a car number as 2076 when it should have been 2070, the court said, "It is not necessary that the description should be such as to identify the property without the aid of parol evidence."[60] With this liberality in regard to description, compare the precision required in the matter of the signature, in *Jennings v. Schwartz* the opening clause of the contract recited the vendor's name, but he neglected to sign the contract, and the court said that the record must be complete without reference to extrinsic matters affecting the rights of the parties.[61]

Filing must be within ten days of possession. But where on delivery of the principal parts of a machine, substantial parts were missing, and these were delivered within a reasonable time, and the contract was then filed within ten days, there being no evidence of bad faith, it was held that the filing was within time.[62] And where the conditional vendor had acquired title under a foreclosure sale, and made no attempt to take possession pending negotiations to sell it to the party in whose possession it remained, the contract which was filed within ten days after the sale was made was held to be valid as against creditors.[63] But where the agreement was to execute the contract when the machine was in running order, which because of difficulties required several months, it was held that a contract filed within ten days thereafter was invalid as to general creditors.[64] The record must recite the truth to constitute constructive notice, thus where the contract recited that the goods for equipping an apartment house were all delivered November 21st, and it was filed January 11th following, the vendor was not protected as against the owner of the apartment house who paid the vendee for the equipment after the filing, even as to that portion of the goods which were actually delivered within ten days of the date of filing.[65]

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[59] *Wittler Corbin Mach. Co. v. Martin*, note 51, *supra*.

[60] *MacCallum-Donahue Fin. Co. v. Warren*, 122 Wash. 176, 210 Pac. 368 (1922). See also *Diamond Iron Works* case, 135 Wash. 228, 237 Pac. 313 (1925), where the contract referred to "plans and specifications."

[61] Note 18, *supra*.

[62] *Anderson v. Langford*, 91 Wash. 176, 157 Pac. 456 (1916). In accord: *Mentzner v. Commercial Lbr Co.*, 110 Wash. 155, 188 Pac. 9 (1920).

[63] *Lundquist v. Olympia Nat. Bk.*, 133 Wash. 600, 234 Pac. 453 (1925).

[64] *National Bread Wrapping Co. v. Crowl*, 137 Wash. 621, 243 Pac. 840 (1926).

[65] *Grunbaum Bros. Furniture Co. v. Humphrey Inv. Co.*, 144 Wash. 620, 258 Pac. 517 (1927).

A former statute was construed to protect only such creditors as had acquired some form of lien on the property, hence not protecting a receiver who represented general unsecured creditors[66] following the construction of the statute for filing chattel mortgages.[67] But the present statutes, both as to conditional sales[68] and as to chattel mortgages,[69] now read, "whether or not such creditors have or claim a lien upon such property" The statute, of course, protects purchasers and encumbrancers in good faith for a valuable consideration. A pre-existing debt is valuable consideration.[70] Filing the contract after the lapse of the ten days does not make it notice even to creditors who extended credit after it was filed.[71]

The filing of a conditional sale is for the protection of the vendor only, and the vendor, if left in possession, may, under the doctrine of retention of possession, pass good title to a third party, free of the vendee's interest.[72]

Where the vendee under an unrecorded conditional sale, made an outright sale to a third party, since the latter was protected by the failure to file, he was not allowed to rescind his own contract on the grounds that his vendor did not have title.[73] Thus the conditional vendee himself seems to have gained some benefit from the failure to record.

The Uniform Conditional Sales Act provides for filing in the county where the chattel is to be kept, rather than in the county of the residence of the vendee, and also provides for re-filing upon removal of the chattel to a new county within ten days after the vendor has received notice of such removal. It also limits the life of the filing to three years, but provides refiling within the period

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[66] Rem. & Bal. Code, 370. *Malmo v. Washington Rendering & Fertilizer Co.*, 79 Wash. 534, 140 Pac. 569 (1914).

[67] *Heal v. Evans Creek Coal & Coke Co.*, 71 Wash. 225, 128 Pac. 211 (1912).

[68] Note 53, *supra*. Only subsequent creditors are protected. A mortgagee with a mortgage covering after acquired property can not take advantage of a subsequent conditional sale which was not filed. *Bornstein v. Allen*, 127 Wash. 314, 220 Pac. 801 (1923) *Pratt v. Scand. Am. Bank*, 103, Wash. 134, 174 Pac. 462 (1918).

[69] Note 75, *infra*.

[70] *Johnston v. Wood*, 19 Wash. 441, 53 Pac. 707 (1898) *Worley v. Met. Motor Car Co., Inc.*, note 15, *supra*. *Long v. McAvoy*, note 27, *supra*; *Lee Tire & Rubber Co. v. Gray*, 164 Wash. 569, 4 Pac. (2d) 503 (1931).

[71] *Am. Multigraph Sales Co. v. Jones*, note 15, *supra*. This case was decided under the statute construed to protect only creditors who had acquired a specific lien, but under the present statute (note 53, *supra*) should apply equally to general creditors.

[72] *Flynn v. Garford Motor Truck Co.*, note 58, *supra*, *No. Western Finance Co. v. Russell*, 161 Wash. 389, 297 Pac. 186 (1931).

[73] *Woods v. McIvor* 74 Wash. 359, 133 Pac. 590 (1913).

for successive periods of one year, much as the Washington provision for chattel mortgages.[74]

There are several statutes dealing with the filing of chattel mortgages. Rem. 3780 and 3781[75] refers to the original filing and provides that, in order to constitute constructive notice, it must contain the mortgagor's affidavit of good faith, must be acknowledged, and must be filed within ten days after it is executed, in the county in which the chattel is situated. This contrasts with the conditional sale, which is to be filed within ten days of delivery of possession, and in the county of the vendee's residence, regardless of the location of the chattel. The word *situated* is interpreted to mean where by the terms of the mortgage, the chattel is to be kept. Thus, in case of a purchase money chattel mortgage, it should be filed not in the county where the sale is made, and where the chattel literally is *situated,* but in the county where the vendee-mortgagor is expected to keep it.[76]

In the case of a conditional sale, a *memorandum* of the sale must be signed by both vendor and vendee; in the case of a mortgage, it must be acknowledged by the mortgagor and must contain an affidavit of good faith. Presumably the difference in the requirements is due to the fact that in the case of a conditional sale there is a change of possession, itself a matter of some notoriety, whereas

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[74] Secs. 10, 11, 13.

[75] Rem. Rev. Stats., Sec. 3780: A mortgage of personal property is void against all creditors of the mortgagor, both existing and subsequent, whether or not they have or claim a lien upon such property, and against all subsequent purchasers, pledgees, and mortgagees and encumbrancers for value and in good faith, unless it is accompanied by the affidavit of the mortgagor that it is made in good faith, and without any design to hinder, delay or defraud creditors, and unless it is acknowledged and filed within ten days from the time of the execution thereof in the office of the county auditor of the county in which the mortgaged property is situated as provided by law.

Sec. 3781. Every such instrument within ten days from the time of the execution thereof shall be filed in the office of the county auditor of the county in which the mortgaged property is situated, and such auditor shall file all such instruments when presented for the purpose, upon the payment of proper fees therefor, indorse thereon the time of reception, the number thereof, and shall enter in a suitable book to be provided by him at the expense of his county, with an alphabetical index thereto, used exclusively for that purpose, ruled into separate columns with appropriate heads: "The time of filing," "Name of mortgagor," "Name of mortgagee, "Date of instrument," "Amount secured," "When due," and "Date of release." An index to said book shall be kept in the manner required for indexing deeds to real estate, and the county auditor shall receive for the services required by this act the sum of fifteen cents for every instrument, and the moneys so collected shall be accounted for as other fees of his office. Such instruments shall remain on file for the inspection of the public.

[76] *No. Pacific Bank v. Pac. Mercantile Agency,* 153 Wash. 37, 279 Pac. 103 (1929). For full statement of the case see note 78, *infra.*

a mortgage may frequently be given where it is accompanied by no outward sign and lends itself to the perpetration of a fraud upon creditors of the mortgagor. It is interesting to note that the Uniform Chattel Mortgage Act requires neither acknowledgment nor affidavit of good faith, and makes filing notice only from the time of filing. Its draftsman, Professor Karl N. Llewellyn, was able to find no record of any mortgagor having been prosecuted for giving a false affidavit, and the Act very sensibly punishes the giving of a fraudulent mortgage rather than of a false affidavit. An acknowledgment, however, if added, raises a presumption of due execution.[77]

Both the conditional sale and the chattel mortgage, unless filed, are invalid as to subsequent general creditors, purchasers, pledgees, or encumbrances "*bona fide*" or "in good faith."

Rem. 3788 provides for refiling of a mortgage in another county to which the chattel has been removed, within thirty days after removal. In stating the classes of persons as to whom it is invalid unless filed within that time, it omits the words "in good faith."

An inference as to the effect of this omission may be drawn from the case of *North Pacific Bank v. Pacific Mercantile Agency.*[78] B bought a car from S in P County, the car to be kept in T County S filed the purchase money chattel mortgage in P County but not in T County X having actual notice of the mortgage, repaired the car under an agreement giving him the right to possession until he was paid. X relied on the failure to reord in T County It was held that since the place for the original filing was T County, Rem. 3789 applied, and X lost because he was not an encumbrancer "in good faith," the filing in P County being of no effect whatever. However, the court implies that had Rem. 3788 applied, as it would have had the mortgage required the car to be kept in P County, then since the statute dealing with removals omits the "good faith" provision, X could have held the car regardless of his actual notice.

Where the chattel has been removed from the county where it was to be kept, and the mortgagee fails to file within thirty days of such removal a purchaser who buys before the expiration of the thirty days, without actual notice of the mortgage, but knowing from which county it had been brought, is protected, although he would not have been had it been filed subsequent to his purchase

[77] Sec. 2, 8, 35.
[78] Note 76, *supra.*

but before the thirty days elapsed.[79] Although the implication from these two cases would seem to be that one with notice might take free of a mortgage not properly refiled upon removal, it has been held that one who accepts a mortgage upon the removed chattels, expressly made subject to the former mortgage, cannot contest the validity of the former mortgage, notwithstanding it was never refiled.[80] However, such a mortgage is invalid as to a creditor levying on such chattels, although he had actual notice.[81] But where two mortgages were given to different parties and filed, but the first mortgage was never refiled after removal to a second county, the second mortgagee, who knew of the first mortgage, was held liable to the first mortgagee in conversion, where he sold the property within the thirty days and applied the proceeds to the payment of his own mortgage.[82]

Even actual knowledge of a mortgage which is not acknowledged does not make it valid as to a general creditor of the mortgagor and if such creditor takes a mortgage to secure his claim, his mortgage is superior to the former mortgage.[83]

Rem. 3785 provides that a chattel mortgage for over $300 may be *recorded* but it must also be filed and indexed as other chattel mortgages.[84]

Under Rem. 3782, the filing of a chattel mortgage ceases to be constructive notice after two years to creditors of the mortgagor and subsequent purchasers and encumbrancers in good faith, unless the mortgagee files an affidavit as to the amount still due. Rem. 3783 provides for subsequent renewals at yearly intervals, by filing of the affidavit "before the time when any such mortgage would otherwise cease to be valid as against such creditors and subsequent purchasers and mortgagees in good faith." The expression "cease to be valid" was made the basis of a contention that unless such affidavit were filed the mortgage ceased to be valid to a subsequent mortgagee with actual knowledge but the court very prop-

[79] *Muller v. Barshar* 119 Wash. 252, 205 Pac. 845 (1922).

[80] *First Nat. Bank v. Northwest Motor Co.*, 108 Wash. 167, 183 Pac. 81 (1919).

[81] *Turner v. Caldwell*, 15 Wash. 274 (1896).

[82] *Schneller v. Vincent*, 131 Wash. 238, 229 Pac. 737 (1924). Affirmed on rehearing, 135 Wash. 698, 237 Pac. 1119 (1925).

[83] *Belcher v. Young*, 90 Wash. 303, 155 Pac. 1060 (1916) *Seaboard Dairy Cr Corp. v. Paulson*, note 6, *supra*, *Smith v. Allen*, 78 Wash. 135, 138 Pac. 683 (1914). But in earlier cases see *contra* result: *Hicks v. Nat'l Surety Co.*, 50 Wash. 16, 96 Pac. 515. (1908) followed in *Thomas v. Grote-Rankin Co.*, 75 Wash. 280, 134 Pac. 919 (1913).

[84] See *First Nat. Bk. v. White Dulang Co.*, 121 Wash. 386, 209 Pac. 861 (1922). For a case holding recording alone is sufficient without filing, under Rem. & Ball. 3661, a former statute of similar purport, see *Van Winkle v. Mitchum*, 66 Wash. 296, 119 Pac. 748 (1911).

erly rejected this contention.[85] The implication of *Community State Bank v. Martin*[86] would seem to be that if one converts the chattel while the filing is still valid notice, the failure to refile within two years does not protect him, his liability having been complete when the conversion took place, although in that case the action was started before the two years expired and only the trial came later. If this is the proper implication, then the failure to refile to renew a mortgage does not protect a converter, while the implication of *North Pacific Bank v. Mercantile Agency, supra,* is that the failure to refile in case of removal would do so.

It might be questioned whether a converter were within the protection of the recording statutes. Were he always a deliberate wrongdoer he should not be, but where, as in the *Community State Bank* case, *supra,* he is a lessor who has sold a crop under a claim of prior lien, and the question is whether he became a converter in failing to pay the surplus, if any, to the mortgagee, it would seem that he should be entitled to protection.

An interesting problem has been recurrently before the court which involves the question of how far a purchaser from a regular dealer, and in the ordinary course of business, is bound by the constructive notice of a filed instrument.

In *State Bank v. Johnson,*[87] the vendor sold a car to B, and assigned the contract to F as an outright sale of the contract;[88] B becoming discouraged returned the car to the vendor who then sold it to X as a second hand car. It was held that X took subject to the rights of the assignee F The court said that, assuming but not deciding that the filing of the contract to B did not operate as constructive notice to X, still the vendor had sold a car it did not own, and the principle of market overt did not obtain in this country It is difficult to see how any other decision could be reached.

In *Gramm-Bernstein Motor Truck Co. v. Todd,*[89] the dealer received his cars under filed conditional sale contracts or chattel mortgages, but letters indicated he was not expected to pay for

[85] *First State Bank v. McGregor Co.*, 141 Wash. 549, 251 Pac. 865, 51 A. L. R. 585 (1927). *Farmers State Bank v. McCulley*, 133 Wash. 364, 233 Pac 661 (1925), applies the same construction and deals also with a mortgage for future advances. *Othello State Bank v. Case Threshing Machine Co.*, 113 Wash. 680, 194 Pac. 563 (1921). Cf. also 77 Wash. 115, 113 Wash. 680, 153 Wash. 37.

[86] 144 Wash. 483, 258 Pac. 498 (1927).

[87] 104 Wash. 550, 177 Pac. 340, 3 A. L. R. 235 (1918).

[88] Rem. 3791-1 provides for filing an assignment intended as security. Note 57, *supra.*

[89] 121 Wash. 145, 209 Pac. 3 (1930). See 5 Wash. Law Rev. 65 at p. 69.

them until he had resold. It was held that purchasers from the dealer were not bound by constructive notice.

But in *Hardin v. State Bank of Seattle*,[90] where the dealer also received his cars under filed chattel mortgages, it appeared that he was authorized to sell but not deliver before he paid for them. It was held, with two justices dissenting, that the purchaser from the dealer was bound by constructive notice.

In *Flynn v. Garford Motor Truck Co.*,[91] the conditional vendee left the truck in the possession of the vendor. The contract was filed under Rem. 3790, 3791. The vendor sold the truck as his own to the defendant. The original vendee, in whom title had vested as a result of an action against him for the full purchase price, sued the defendant for conversion, and it was held that the defendant took without constructive notice by the filing because the statutes above mentioned gave protection to the vendor only and not to a vendee who left the chattel in the possession of the vendor who was able to pass good title under the doctrine of retention of possession.

In *Northwestern Finance Co. v. Russell*,[92] the dealer sold a car to his salesman under a conditional sale which was duly filed. He then assigned the contract to the plaintiff, and subsequently sold the car to defendant who believed it to be a new car. The court found for the defendant on the grounds that plaintiff was chargeable with notice of the scheme for double financing and knew that the car was kept on the sales floor of the dealer. The court also commented on the fact that plaintiff still tried to collect from the dealer and his salesman after knowledge of the sale to defendant.

In the last case of this character to come before the court, *Commercial Credit Co. v. Cutler*,[93] the dealer, who was the sole local agent for that type of car, sold a car to his salesman, and the conditional sale was filed. The contract was then assigned to plaintiff who knew that the salesman was using the car as a demonstrator. The salesman made the first payment to the plaintiff, but all subsequent payments were made by the dealer. The dealer and his salesman then sold the car to defendant who knew it was a demonstrator and apparently received an extra allowance on his old car

[90] 119 Wash. 169, 205 Pac. 382 (1922). See 5 Wash. Law Rev. 65 at p. 68.

[91] Note 58, *supra*.

[92] Note 72, *supra*. Case note in 6 Wash. Law Rev. 174 (1931) indicates that the Uniform Sales Act, Sec. 25, plus Sec. 76(2), which provides that good faith means "honestly" whether negligent or not, would have settled this case without discussion of comparative innocence.

[93] 29 Pac. (2d) 686 (Wash. 1934).

as a consequence. It was held that the filing constituted notice to the defendant. A dissenting opinion by three justices stressed the fact that a careful search of the records would have disclosed no conditional sale *to* the dealer, and no chattel mortgage given *by* him, and contended that there was no reason to search the records for a conditional sale *by* the dealer, and pointed out that plaintiff had lent itself to an arrangement calculated to injure an innocent purchaser.

While it is difficult to draw from these cases a clear cut rule for future guidance, it would appear that the court is looking at the situation subjectively from the point of view of the holder of such security instruments, rather than objectively from the position of the innocent purchaser in the regular course of business, and if the latter is protected from the operation of constructive notice, it is only when the security holder has actually or impliedly authorized a sale and delivery by the dealer, or with something approaching actual knowledge has participated in a fraudulent scheme of financing.

The writer is impressed with the policy of the new Uniform Trust Receipts Act which relieves the purchaser from a dealer in the regular course of business from the effect of constructive notice arising from the filing of a security instrument, whether the instrument is filed under the Trust Receipts Act or any other act providing for the filing of such security instrument.[94]

Notice should be taken of recent legislation relating to the filing of certain security instruments. Under the new state policy with regard to the registration of motor vehicles provision is made for filing with the State Treasurer of encumbrances upon motor vehicles and thus provides for a state record of the title to such readily moveable property.[95] Provision is also made for the filing of chattel mortgages covering mixed personalty and realty in a manner to give evidence of such encumbrance to one searching the title to the realty involved.[96] A somewhat similar provision relating to conditional sales has already been mentioned.

Thus it would appear that the requirements to give notice to the

[94] Section 16: "As to any transaction falling within the provisions both of this act and of any other act requiring filing or recording, the entrustor shall not be required to comply with both, but by complying with the provisions of either at his election may have the protection given by the act complied with; except that buyers in the ordinary course of trade as described in subsection 2 of Section 9, and lienors as described in Section 11, shall be protected as therein provided, although the compliance of the entrustor be with the filing or recording requirements of another act."

[95] Laws of '33, Rem. 6311-5, 6311-7.

[96] Rem. Rev. Stats. 15597, 10598.

world of a conditional sale are less burdensome than in the case of the chattel mortgage, where the failure to discover the removal of the chattel within thirty days may result in the loss of the mortgagee's security This would suggest that the conditional sale device would be preferable from the vendor's viewpoint in the case of a chattel readily moveable, unless in the particular case the advantage of having the vendee's unconditional obligation to pay a deficiency judgment were sufficient to balance the scales in favor of the mortgage.

RIGHTS, REMEDIES AND LIABILITIES

By the great weight of authority in other states, the risk of loss in the event of destruction without fault is placed upon the conditional vendee, either on the ground that the vendor has fully performed in delivering possession and the right to acquire title,[97] or that the vendor like the chattel mortgagee under the title theory of mortgages, retains the title for security only,[98] or under Section 22 (a) of the Uniform Sales Act.[99] Prior to the adoption of the Sales Act in this state in 1925,[100] the Supreme Court of Washington placed the risk of loss on the vendor, construing the contract strictly as a sale upon condition.[101] Whether the effect of the Sales Act will be to change the rule in this state cannot be said with certainty The court has shown a disposition to follow Professor Williston's interpretation of the Sales Act, and his interpretation would place the risk of loss upon the conditional vendee.[102] The only case the writer has found construing Section 22 did not involve a conditional sale.[103] *Ashford v. Reese,*[104] the companion case to *Holt v. Jaussaud,*[105] applied to real property the same rule that risk of loss is upon the conditional vendee. Since the Sales Act would not affect the rule as to realty, the court might feel relucatnt to find that the rule as to personality was necessarily changed. In these famous cases rendered simultaneously the court expressed its opinion vigorously that the conditional vendee has no interest,

[97] *Burnley v. Tufts,* 66 Miss. 48, 5 So. 627, 14 A. S. R. 540 (1889).
[98] *Osborn v. South Shore Lumber Co.,* 91 Wis. 526, 65 N. W 184 (1895).
[99] *O'Neil-Adams Co. v. Eklund,* 89 Conn. 232, 93 Atl. 524, Ann. Cas. 1918D 379 (1915).
[100] Laws of 1925, Ch. 142; Rem. Rev. Stats. 5836-22 (a) Pierce Code, 6227-22 (a).
[101] *Holt Mfg. Co. v. Jaussaud,* 132 Wash. 667, 233 Pac. 35, 38 A. L. R. 1312 (1925).
[102] Williston on Sales, sec. 304.
[103] *Niland Seed Co. v. Idaho Seed Co.,* 160 Wash. 244, 294 Pac. 991 (1931).
[104] *Ashford v. Reese,* 132 Wash. 649, 233 Pac. 19 (1925).
[105] Note 101, *supra.* The language is better known but only slightly stronger than that in earlier cases. See *Peterson v. Chess,* 92 Wash. 682, 159 Pac. 894 (1916).

legal or equitable, in the subject matter of the sale. Subsequent cases have substantially repudiated this language, but they did not involve risk of loss. It has been held proper to contract that the vendee shall bear the risk, but whether the Sales Act would place it there was not discussed.[106]

Much litigation has arisen in the hope that this generalization meant something more than a mere allocation of risk of loss. Thus far it has led only to disappointment. *Hess v. Starwich*,[107] while repeating the language, held that the vendee had an interest which could be attached, without undertaking to label the interest otherwise. In *Pratt v. Rhodes*,[108] again reiterating this expression of opinion, the court found that the conditional vendee of realty was entitled to specific performance and was not to be relegated to an action for damages only If further added that full performance by the conditional vendee vested equitable title in him. In *Western Bond Co. v. Chester*,[109] while finding that no injury had resulted from the omission, the court said that the jury should have been instructed to limit the recovery of the vendor against a sheriff who had wrongfully attached the chattel in an action against the vendee, to the amount of the vendor's interest. In *Seeley v. Peabody*,[110] the vendor had wrongfully declared a forfeiture and seized a herd of dairy cows, the vendee was permitted to recover their value when seized, less the balance due on the contract, in an action for conversion. If he had no property interest to sustain trover, he must at least have had a right to possession, similar to the lessee of a chattel, to support trespass on the case for conversion.

Finally in *Kuhn v. Ambrose*,[111] where the vendor's assignee relied upon this dictum to support his contention that the vendee

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[106] *Seaboard Sec. Co. v. Berg*, note 30, *supra*. In *Dysart v. Colonial Fire Underwriters*, 142 Wash. 601, 254 Pac. 240 (1927), the contract required the vendee to pay the premium on insurance payable to both as interests might appear. When fire destroyed the property the vendee was not in default. Vendor declared forfeiture for subsequent default in payment. *Held*: The vendor cannot declare forfeiture when he himself is unable to perform, besides the contingency (fire) provided for has occurred. The vendor received only the balance due on his contract, the remainder of the insurance going to the vendee, who thus suffered any loss not covered by insurance. This decision places the risk of loss on the vendee by contract, but the suggestion that the fire rendered the vendor unable to perform suggests the theory that risk is on vendor, for otherwise he had already fully performed.

[107] 149 Wash. 679, 272 Pac. 75 (1928). In *Tope v. Brattain*, 172 Wash. 556, 21 Pac. (2d) 241 (1933) it was held his interest could be mortgaged.

[108] 142 Wash. 441, 253 Pac. 640, 256 Pac. 503 (1927).

[109] 145 Wash. 81, 259 Pac. 13 (1927).

[110] 139 Wash. 382, 247 Pac. 471 (1926).

[111] 171 Wash. 528, 18 Pac. (2d) 485 (1933).

had no assignable interest, the court said, "We have, however, since receded somewhat from that position and have later held that the vendee does have some interest."

The mortgagee is entitled to payment regardless of the destruction of the chattel, because his obligation is unconditional. Both the vendor and the mortgagee have an insurable interest.[112] Where the contract required the vendee to insure, and the vendee insured in the name of his own transferee, the conditional vendor could collect from the insurance company, the court remarking that the insurance company had knowledge or the means of obtaining the knowledge as to the contract had it followed up the inquiries suggested.[113]

The vendor's distinctive remedy is to forfeit the contract, on default by the vendee, and his right is not affected by the fact that the county has attached the chattel to collect taxes owed by the vendee on other property.[114] The court remarked that possibly the county could have kept the contract alive by making payments. His right to forfeit is not affected by the fact that creditors of the vendee have attached the latter's interest, and the sheriff who seizes such property acts at his peril if the vendor declares a forfeiture.[115]

Though the contract be not filed, the vendor may repossess the chattel from a purchaser with knowledge, and the latter bears the burden of proving good faith.[116] Where an old cash register was to form part of the consideration for a new one, the vendor was allowed to recover the new one and was not limited to an action to obtain possession of the old.[117] If the vendee's check is returned unpaid for insufficient funds, the vendor may forfeit.[118]

Where the vendee had fully completed the job for which he bought the power shovel, but claimed substantial damages because of delays for repairs, and after repossession by the vendor sued the latter to recover what he had paid, the court in finding that the forfeiture was proper and that an inequitable result had not been reached, compared only the damages suffered by the vendee with the rental value, although the rental value was considerably less

[112] *O'Neill v. Pac. St. Fire Ins. Co.*, 128 Wash. 133, 222 Pac. 215 (1923). *Quinn v. Parke*, note 2, *supra*. Rem. Rev. Stats. 7033 defines insurable interest to include every interest of such a nature that contemplated peril might directly damnify the insured.

[113] *Robbins v. Milwaukee Ins. Co.*, 102 Wash. 539, 173 Pac. 634 (1918).

[114] *Pac. Fin. Corp. v. Snohomish Co.*, 160 Wash. 384, 295 Pac. 110 (1931).

[115] Note 109, *supra*.

[116] *Wittler Corbin Mach. Co.*, note 51, *supra*.

[117] *Nat'l Cash. Reg. Co. v. Petsas*, 43 Wash. 376, 86 Pac. 662 (1906).

[118] *Liliopoulos v. Ayerest*, 125 Wash. 134, 215 Pac. 339 (1923).

than the damages arising from delay and repairs *plus* the amount paid on the contract.[119] It would seem that where the defects are not sufficient to entitle the vendee to rescission, he should at least tender the full purchase price less the amount of his actual damages. The court has held that even after a declaration of forfeiture, the vendee may acquire title by payment of the balance due plus costs to date.[120] A tender by the vendee conditioned upon clearing the title to the chattel has been held to bar forfeiture.[121] The vendor may put himself in a position where by reason of the vendee's reliance upon him he is not justified in declaring a forfeiture.[122]

The vendor's right of possession after forfeiture will support replevin.[123] But he may not retake the chattel without court action, even with the aid of the police, unless it can be done without breach of the peace.[124]

The mortgagee cannot maintain replevin even though the mortgage gives him a right to possession after default;[125] but he may do so if he is entitled to possession before default and it is wrongfully taken from him.[126]

The mortgagee's distinctive remedy is foreclosure.[127] The statute provides for a rather summary mode of foreclosure of a chattel mortgage; upon proper notice after the debt is due he may have the property sold as upon execution on a judgment, without trial or order of the court, but the mortgagor or any party interested in contesting the mortgage may throw the case into the Superior Court, and injunctive relief is provided for.[128] The statute also provides that if the mortgagee reasonably feels that his security is imperiled, he may accelerate the debt and if the debt is for a liquidated amount without interest, he need not discount it because of the acceleration.[129] Apparently a conditional vendor may pro-

[119] *Campbell v. Bucyrus-Erie Co.*, 172 Wash. 428, 20 Pac. (2d) 594 (1933).

[120] *Nat. Cash Reg. Co. v. Wapples*, 52 Wash. 657, 101 Pac. 227 (1909).

[121] *Grennelle v. Boulais*, note 3, *supra*.

[122] *Seattle Auto Co. v. Essex*, 138 Wash. 409, 244 Pac. 705 (1926) *Breaks v. Spokane Auto Co.*, 93 Wash. 143, 160 Pac. 291 (1916).

[123] *Carabin v. Wilhelm*, 87 Wash. 52, 151 Pac. 87 (1915).

[124] *Roberts v. Speck*, 169 Wash. 613, 14 Pac. (2d) 33 (1932)

[125] *Sayward v. Nunan*, 6 Wash. 87, 32 Pac. 1022 (1893), and *Spokane Sec. Fin. Co. v. Crowley Lbr.*, 152 Wash. 697, 279 Pac. 103 (1929) approving *Nettleton v. Evans*, 67 Wash. 227, 121 Pac. 54 (1912), and expressly overruling *Bancroft-Whitney Co. v. Gowan*, 24 Wash. 66, 63 Pac. 1111 (1901).

[126] *Burke v. Wilson*, 107 Wash. 454, 181 Pac. 984 (1919).

[127] *Silsby v. Aldredge*, 1 Wash. 117, 23 Pac. 836 (1890) *Spokane Sec. Fin. Co. v. Crowley Lbr Co.*, note 125, *supra*, *Roche Fruit & Produce Co. v. Vaught*, 143 Wash. 601, 255 Pac. 953 (1927).

[128] Rem. Rev. Stats. 1104-1110.

[129] Rem. Rev. Stats. 1111 and 1112. *Lee v. Walmsley*, 136 Wash. 573, 240 Pac. 906 (1925).

vide by contract for a similar acceleration.[130] The mortgagee, like the conditional vendor, is not entitled to take direct action and seize the chattel, except to the extent provided for in the statute above mentioned.[131]

The conditional vendor may sue for the purchase money against both the vendee and an assignee who assumed the contract, which assumption may be implied, but he is not entitled to a lien against the chattel even though he endeavors to assert any right of the vendee, who is not in court, to have the chattel applied to the payment of the obligation.[132]

The mortgagor has legal title[133] and, like the conditional vendee, the right to possession unless otherwise provided by contract.[134] While the vendee's possession may be taken from him by replevin after default as indicated above, the mortgagor's may be taken only by some form of foreclosure and sale.[135]

Obviously the mortgagor has an insurable interest. The conditional vendee has a similar interest.[136] In a decision allowing a conditional vendee of realty to recover in full on a valued policy, the court remarked that as to personalty there could be no recovery in the absence of proof of special interest.[137]

The mortgagor's interest, like that of the vendee, is subject to attachment, but where the mortgagee is in possession, possession cannot be taken from him by attachment, however, the mortgagee may be garnished.[138]

Actions in conversion by the various parties to these instruments have produced a considerable number of cases and some odd results.

The mortgagee may sue in conversion, the court remarking that otherwise his security might be destroyed without remedy[139] His

[130] *Richardson v. Gt. Western Motors Co.*, 109 Wash. 324, 187 Pac. 333 (1920).

[131] *Schultz v. Wells Butchers Supply Co.*, 151 Wash. 382, 275 Pac. 737 (1929) *Nettleton v. Evans*, note 125, *supra*. This is true even though the mortgage provides mortgagee may take possession using necessary force. *McClellan v. Gaston*, 18 Wash. 472, 51 Pac. 1062 (1898).

[132] *Nat. Cr Co. v. Cascl. Co.*, 173 Wash. 275, 22 Pac. (2d) 670 (1933) *Rodger v. Johnson*, 148 Wash. 675, 270 Pac. 105 (1928).

[133] *Voorhies v. Hennessy*, 7 Wash. 243, 34 Pac. 931 (1893).

[134] *Silsby v. Aldredge*, note 127, *supra*.

[135] *Raymond Bros. v. Thomas*, note 39, *supra*, *Spokane Sec. Fin. Co. v. Crowley*, note 125, *supra*.

[136] *Quinn v. Parke Lacey Mach. Co.*, note 2, *supra*; *Wells Chevrolet Co. v. Pac. Fire Ins. Co.*, 161 Wash. 1, 296 Pac. 177 (1931).

[137] *Bright v. Hanover Fire Ins. Co.*, 48 Wash. 60, 92 Pac. 779 (1907).

[138] *Wilson v. Montague*, 57 Mich. 638, 24 N. W 851 (1885) *Marsh v. Wade*, 1 Wash. 538, 20 Pac. 578 (1889).

[139] *Spokane Sec. Fin. Co. v. Crowley*, note 125, *supra*, *German Am. State Bank v. Seattle Grain Co.*, 89 Wash. 376, 154 Pac. 443 (1916) *Schneller v. Vincent*, note 82, *supra*.

action is for the destruction of his lien.[140] The conditional vendor may also recover for conversion if he has declared a forfeiture and is entitled to possession, and the court has suggested that his recovery should be limited to his interest, thus implying that he occupies much the same position as the mortgagee.[141] Under the theory of forfeiture adhered to in this state the vendor after forfeiture should be entitled to recover for the full value of the chattel.

The conditional vendee may recover damages for an injury to the car.[142] Where he was not in default when the injury occurred, he was allowed to recover even though the vendor forfeited the contract after the action was brought but before judgment.[143]

The vendee in possession may recover in conversion where he has unconditionally promised to pay the full purchase price,[144] or where title has vested in him by virtue of an action against him for the full purchase price.[145]

But the vendee may also recover the full value of the chattel in an action for conversion although the contract is still forfeitable. Where the vendee's lessee wrongfully seized the vendee's restaurant equipment, the defendant pleaded that it was encumbered by chattel mortgages and conditional sales, but the vendee recovered.[146]

Again, the vendee was in possession under a conditional sale when the property was damaged. The vendor did not elect to repossess. The vendee recovered full value on two possible grounds there having been no forfeiture declared, the vendee was still liable to the vendor for the full value, and the vendee in possession is the same as a bailee and can recover full value from a *tort feasor* regardless of the extent of his own interest.[147]

The most interesting case of this character was that of *Burnett v. Dunnigan*.[148] The conditional vendee loaned his car to X to make a certain trip. X exceeded his authority and went much farther, and while doing so wrecked the car. He put it into a garage for repairs. The vendee bought an action for conversion.

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[140] *Ballen v. Wilson Creek Union Grain Co.*, 90 Wash. 400, 156 Pac. 404 (1916).
[141] *Western Bond & Mortgage Co. v. Chester* note 109, *supra*.
[142] *Oros v. Allen*, 133 Wash. 268, 233 Pac. 314 (1925).
[143] *Helf v. Hanson*, 167 Wash. 206, 9 Pac. (2d) 110 (1932).
[144] *Messinger v. Murphy*, 33 Wash. 353, 74 Pac. 480 (1903).
[145] *Flynn v. Garford Motor Truck Co.*, note 58, *supra*.
[146] *Demir v. Sorrenson*, 167 Wash. 363, 9 Pac. (2d) 383 (1932).
[147] *Stotts v. Puget Sound P & L. Co.*, 94 Wash. 339, 162 Pac. 519 (1917).
[148] 165 Wash. 164, 4 Pac. (2d) 829 (1931).

Thereafter the vendor repossessed before the vendee's case reached court. Four justices held that the vendee could recover whether the vendor's actions amounted to a forfeiture or not. Two justices concurred on the ground that there had been no forfeiture. Three justices dissented on the ground that the vendee should have been permitted to recover only the value of his equity

The basis of the decision of the four justices would seem to work a hardship. The vendor has the car; the vendee the full value. The converter pays the value of the car, plus the cost of repairs, and has nothing but experience. Exemplary damages, indeed!

The basis on which recovery is had in conversion is that of an involuntary sale but the converter should get what he pays for. The only justification for permitting the vendee to recover the full value is that of implied authority to sell the property and pass title. The case is correct in its holding that no subsequent act of the vendor should defeat recovery in the action already brought, but the suggestion or implicatoin that the vendor might effectively forfeit the contract after the action was brought rejects the only basis on which it would seem that the action of the vendee could be sustained.[149] But the case has been cited and followed in the

[149] The view elsewhere would seem to be that the vendee in possession at the time the chattel is damaged or converted has an implied authority to bind the vendor by his action. The conditional vendee may recover full damages even though he is in default at the time of the taking, and the vendor is thereby barred. *Lord v. Buchanan*, 69 Vt. 320, 37 Atl. 1048, 60 A. S. R. 933 (1897). He may maintain trover after default and even after the vendor has made a demand on the converter for a return of the goods, based on bare possession in the vendee. *Harrington v. King*, 121 Mass. 269 (1876). And he may maintain trover although there is an action pending against the defendant by the vendor for trover. *Aldrich v. Hodges*, 164 Mass. 570, 42 N. E. 107 (1895). He may recover full damages, but will hold the balance beyond his own interest in trust for the vendor. *Caroline C. & O. Ry. Co. v. Unaka Springs Lbr Co.*, 130 Tenn. 354, 170 S. W 591 (1914) Where the conditional vendee of a horse recovered $80.00 from the railway company which killed it, and bought another horse for $60.00, it was held that the vendor had an action for money had and received but no specific lien, and the new horse was entirely the property of the vendee. *Smith v. Gufford*, 36 Fla. 481, 18 So. 717 (1895). Where the defendant damaged the car while in the hands of the conditional vendee and the vendor (plaintiff) notified all parties of his claim the defendant thereafter made a compromise settlement with the vendee and it was held that, since the vendee could have recovered full damages, he had power to make a fair settlement of his claim and thereby bar the vendor. *Ellis Motor Co. v. Hancock*, 145 S. E. 518 (1928). A release by the vendee, made in good faith, is a bar to an action by the vendor. *Harris v. Seaboard Air Line Railway Co.*, 190 N. C. 480, 130 S. E. 319, 46 A. L. R. 1452 and 1458 (1925) However, it has been held that a conditional vendee in default at the time of the conversion cannot maintain trover where the vendor has made an election to forfeit by making a demand on the defendant for the return of the property. *Landrey v. Mandelston*, 109 Me. 376, 84 Atl. 642 (1912). See also *Lacey v. Great No. Ry. Co.*, 70 Mont. 346, 225 Pac. 808, 38 A. L. R. 1331 (1924).

case of an action for damages[150] and in another case where the question of intervening forfeiture was not involved.[151]

VENDOR'S ELECTION OF REMEDIES

Frequent reference has been made to the conditional vendor's mutually exclusive remedies where the vendee defaults. The question of what the vendor may do toward asserting one right without losing the right to pursue the other has been a fruitful source of litigation.

An action for the entire unpaid balance, obviously is an election.[152] It is not so apparent that an action for intermediate payments should constitute such election. In fact, in conditional sales of realty an action for intermediate installments is held not to bar a forfeiture for subsequent default, although if forfeiture is declared before judgment is obtained in such an action for an installment, the forfeiture is a bar to further proceedings.[153] The effect given to such forfeiture would seem to be at variance with the usual rule that the rights of the parties to an action are to be determined as of the date when proceedings are instituted. But the holding that when an installment is due its payment, whether made voluntarily or involuntarily, does not bar forfeiture for subsequent defaults, is strictly logical. This is particularly sound in view of the holding that a note or other evidence of obligation given for prior payments, is collectible even after forfeiture if, and only if, the vendor does not retain the right to forfeit the contract for the non-payment of such note when due.[154] The bringing of the action for such installment would take it out of the class of obligations for the non-payment of which forfeiture would be allowed.

There is a rule that a note given for an antecedent debt, owed by the maker to the payee, is presumptively given as collateral security and not in discharge of the obligation;[155] and for this reason, when a vendor takes the vendee's note for a part of the purchase price, more especially if it be for other than the down

[150] *Helf v. Hansen & Keller Truck Co.*, note 143, *supra.*

[151] *Demir v. Sorrenson*, note 146, *supra.*

[152] *Flynn v. Garford Motor Truck Co.*, note 58, supra, *Ramey v. Smith.* 56 Wash. 604, 106 Pac. 160 (1910). But a mere request for payment is not an election which bars repossession. *Com. Cr Co. v. Nat. Cr Co.*, note 11, *supra.*

[153] *Rose v. Rundall*, 86 Wash. 422, 150 Pac. 614 (1915).

[154] *Jones-Short Motor Co. v. Bolin*, 153 Wash. 198, 279 Pac. 395 (1929). For cases showing what evidence would be acceptable to prove that the note was taken in payment, see *Rathke v. Dexter Horton Nat'l Bank*, 161 Wash. 434, 297 Pac. 181 (1931) *Norman v. Meeker* 91 Wash. 534, 158 Pac. 78 (1916) *Vickerman v. Kapp*, 167 Wash. 464, 9 Pac. (2d) 793 (1932).

[155] *Blenz v. Fogle*, 127 Wash. 224, 220 Pac. 790 (1923).

payment, if he desires to be in a position to collect after a declaration of forfeiture, he should be careful that it is understood that the note is taken in *payment* and that the contract can not be forfeited for its non-payment.

Whatever the merit of the above reasoning the Supreme Court has enunciated a different rule in the case of chattels. An action for intermediate installments on a conditional sale contract is held to constitute an election, and thereafter the vendor cannot forfeit the contract and repossess the chattel.[156]

No case has been noticed in which the court has commented on the variation in holding between the personalty and realty contracts.

If the vendor accepts a mortgage on the subject matter of the sale, he is estopped from asserting a retained title, even though the mortgage was given to a trustee.[157] If the purchase money is represented by negotiable notes a transfer of the notes is an election which vests title in the vendee,[158] and this is true even though they are only pledged as collateral security and later redeemed.[159]

However, where the vendee was in default, and gave notes to enable the vendor to raise money, which he did by negotiating the notes, after the last note was paid he was permitted to declare a forfeiture for a subsequent default on the grounds that there was no understanding by either party that this was to prevent a forfeiture.[160] Perhaps the fact that the vendee knew the purpose to which the notes were to be put would justify the inference that they were taken as payment leaving the vendor no right to forfeit the contract for their non-payment. An interesting feature of the case is the court's generalization that the parties may have such dealings as they see fit without constituting an election if the parties so understand.

If the vendor files a claim against the estate of the vendee, deceased, and the claim is allowed, he may not thereafter repossess the car.[161] But apparently if he were mistaken as to his right to

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[156] *Eilers Music House v. Douglass*, note 12, *supra*, *Kenworth Sales Co. v. Salantino*, 154 Wash. 236, 281 Pac. 996 (1929).

[157] *Hinchman v. Pt. Defiance Ry Co.*, 14 Wash. 349, 44 Pac. 867 (1896).

[158] *MacLeod v. Aberdeen Brewing Co.*, 82 Wash. 74, 143 Pac. 440 (1914). But if notes and mortgages are assigned together there is no election. *Western Electric Co. v. Norway etc. Co.*, 124 Wash. 49, 213 Pac. 686 (1923).

[159] *Winton Motor Carriage Co. v. Broadway Auto Co.*, 65 Wash. 650, 118 Pac. 817 (1911).

[160] *Barr v. Lloyd Co.*, 137 Wash. 490, 242 Pac. 1100 (1926).

[161] *Kimble Motor Car Co. v. Andrew*, 125 Wash. 225, 215 Pac. 340 (1923).

an allowance out of the estate, the filing of the claim would not be an election.[162]

Where the vendor combined in an action of replevin a demand for a judgment for the balance due, he was allowed to elect to stand on replevin when the case came on for trial.[163] And title will not vest in the vendee merely because the vendor has failed to perform in full his part of the contract.[164]

It remains to consider cases involving an election to forfeit the contract which arise on a subsequent attempt of the vendor to enforce payment.

An action in replevin is an election which cancels the vendee's obligation to make further payment.[165] An offer by the vendor to sell a soda fountain to one who had purchased a store from the conditional sale vendee, together with subsequent packing of it for reshipment to the vendor's warehouse, was held to be an election to forfeit—the court said rescind—and was a bar to an action against the vendee's purchaser who otherwise would have been liable for the amount due to failure to comply with the requirements of the Bulk Sales Act.[166] Actually taking possession of the chattel is an election.[167] Although a stipulation in the contract for both remedies renders it a mortgage, by a subsequent agreement, in part implied, the vendor may be made the agent of the vendee to sell the chattel, and may thereafter hold the vendee for the deficiency [168]

Where the vendor's assignee consents to the vendor's repossessing the chattel for his own protection, this is not an election by the assignee to take the property which would waive his rights to hold the vendor on his contract of guaranty [169]

General

The merchant of old transacted business on the basis of general credit. He confined his business to business men of established credit ratings or to the members of his community with whose character, habits, means and movements he was personally familiar. The great growth of population and the tendency to shift from place to place, together with the phenomenal development of installment selling has forced the merchant of today to rely increas-

[162] *Morgan Organ Co. v. Armour* note 44, *supra.*
[163] *Carabin v. Wilhelm*, note 123, *supra.*
[164] *Kohler & Chase v. Turner* 84 Wash. 192, 146 Pac. 393 (1915).
[165] *Jordon v. Peek*, note 41, *supra, Thompson v. Murphine*, 79 Wash. 672, 140 Pac. 1073 (1914).
[166] *Stewart-Holmes Drug Co. v. Reed*, 74 Wash. 401, 133 Pac. 577 (1913).
[167] *Jones-Short Motor Co. v. Bolin*, note 154, *supra.*
[168] *Jones v. Reynolds*, 45 Wash. 371, 88 Pac. 577 (1907).
[169] *Fales Paper Co. v. Bortner* 142 Wash. 81, 252 Pac. 539 (1927).

ingly upon security devices. No method can be formulated which will totally eliminate the hazards of such sales. Courts and legislatures, moved by a social consciousness of revolutionary economic change, have paternalistically limited security devices to a narrower range than fertile imagination and entire freedom of contract would have devised. The legal history of the controversies which have arisen is an aid to both seller and buyer in making his selection. Where the circumstances are such that neither the vendor's option to convert the sale into one on general credit, nor the mortgagee's right to a deficiency judgment is of controlling consequence, the summary character of the remedy or the facility of operation must determine the choice. The profitableness of forfeitures is probably more imaginary than real. The statute offers the mortgagee a remedy scarcely less summary than the vendor's claim and recovery The recording statutes require of the conditional vendor less constant attention to preserve his protection than they do of the mortgagee. This may be of great importance if the subject matter is of a readily movable character, and tends to be of lesser moment as the chattel approaches the character of a fixture.

From the purchaser's point of view the mortgage gives him greater assurance that he will receive the benefit of his investment should he become financially embarrassed, while in practice, though not in theory, the position of the conditional vendee tends to approximate the layman's conception that it is at all times his privilege to choose whether he will proceed with the purchase or surrender the chattel and be relieved of further liability

Suggestions For a Composite Act

Neither of the Uniform Acts, dealing with Conditional Sales or Chattel Mortgages, has been adopted in the State of Washington. The Chattel Mortgage Act was finally approved by the Commissioners in 1926. In the eight years since that time no state has adopted either the Chattel Mortgage Act or the Conditional Sales Act, unless it has been done late this year. Eight states and Alaska had previously passed the Conditional Sales Act.

There is a noticeable similarity between the two acts in a number of particulars. The Conditional Sales Act frankly adopts a chattel mortgage theory and permits the vendor in any case to resell the chattel and hold the vendee for a deficiency, if any A sale is required if fifty per cent of the purchase price has been paid, and the vendee may require it in any case, although the Commissioners found as a practical matter that he received little benefit from a sale if less than fifty per cent had been paid. If over $500 has

been paid, notice by publication is required. Redemption is provided for but if the vendor gives the vendee between twenty and forty days notice that he intends to retake the property, he may then proceed to sell the property immediately after taking it without delay except as to requirements for advertising, unless the vendee perform the defaulted obligations before that time.[170]

The Chattel Mortgage Act provides a similar foreclosure procedure, it being provided that redemption may be barred by notice of twenty days of intention to retake possession, after which the mortgagee may proceed to sell in the manner provided by law for the seller having a seller's lien. If no such notice is given sale must be delayed for a ten day redemption period. If the mortgagee receives a written notice from the mortgagor that he believes the property is worth $500 or more notice by publication is required. Ordinary court process of foreclosure is also provided at the option of the mortgagee.[171]

Under either act if an actual sale is made the obligor is entitled to the surplus, if any

Both acts contemplate that the vendor or mortgagee shall take possession on default, if it can be done without breach of the peace.

Both acts provide in the case of chattels attached to, but sever able without material injury from, realty, for filing notice in the manner required for an instrument affecting real property [172]

Neither instrument requires an acknowledgment, but the Chattel Mortgage Act requires two witnesses of the mortgagor's signature and if an acknowledgment is made it creates a presumption of due execution. However, no affidavit of good faith is required. Its draftsman, Professor Llewellyn, as heretofore mentioned, was unable to find any record of a prosecution for a false affidavit, notwithstanding that many fraudulent mortgages have been given. The Act provides a penalty for the giving of a fraudulent mortgage.[173]

The conditional sale is valid as to all parties if filed within ten days of delivery of possession, as is now the case in Washington. But the chattel mortgage makes filing constructive notice only from the time of actual filing.[174]

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[170] Uniform Conditional Sales Act. Sec. 17, 18, 19, 20, 22.
[171] Uniform Chattel Mortgage Act. Sec. 55, 57, 58, 61.
[172] Cond. Sale 64. Ch. Mtg. Sec. 41.
[173] Cond. Sale, Sec. 5. Ch. Mtg. Sec. 9, 43, 52.
[174] Cond. Sale, Sec. 5. Ch. Mtg. Sec. 35.

Both acts limit the effect of the original filing to three years, and provide for repeated renewals of one year each upon refiling with a statement of the account.[175]

A conditional sale is to be filed in the county where the chattels are to be kept, a chattel mortgage in the county where they are located, and also in the county where the mortgagor resides.[176]

Both acts provide for refiling in the district to which the goods are removed within ten days after notice of such removal, the obligor being required to give such notice. The Chattel Mortgage Act also provides that the instrument is invalid as to certain parties if it is not refiled within six months after such removal regardless of notice.[177]

In view of the many similarities, some of which have been mentioned above, the writer believes that the legal profession might well consider, before accepting either act, the possibilities of a composite act covering the entire field of personal property security, with the possible exception of the trust receipt. Such an act should abandon the concept of the preservation of two parallel developments which under the Uniform Acts have become so nearly the same. It should, however, recognize any real social or economic interest and make any necessary special provision.

It would have the advantage of a single filing system. A party examining the records is primarily interested in whether any security interest has been reserved rather than whether one *or* the other kind of claim constitutes a lien upon the property It might be possible to provide for this feature even if separate acts were adopted.

Where the remedies are so nearly the same and eliminate the harshness of the strict forfeiture upon the vendee while committing him to the obligation of a deficiency judgment, it would seem that the social and economic reasons which properly have impelled the courts to draw so fine a distinction between the two types of security and the parties entitled to use them, no longer would exist. A composite act would eliminate a considerable amount of litigation upon such questions.

The following are offered as tentative provisions, expressed in general language, and not in definitive form.

1. The filing of a security instrument shall constitute construc-

[175] Cond. Sale, Sec. 11. Ch. Mtg. Sec. 48.
[176] Cond. Sale, Sec. 51. Ch. Mtg. Sec. 36.
[177] Cond. Sale, Sec. 13, 14. Ch. Mtg. sec. 37, 35.

tive notice only from the date of filing, provided that if the instrument affirmatively shows that it is given to secure the payment of the purchase money, whether it is payable to the vendor or the party who advanced the purchase money, and is accompanied by an actual change of possession, it shall be valid as against all parties if it is filed within ten days of such delivery of possession.

2. The original filing of a security instrument shall be in the county where the chattel is located, provided that if given to secure the payment of purchase money it shall be filed in the county where by the terms of the instrument the chattel is to be kept. In either case it shall also be filed in the county where the obligor resides.

3. The obligor of a security instrument shall give to the obligee written notice of an intention to remove the chattel from the county at least ten days before such removal, unless such removal is for temporary purposes and for a duration of not over thirty days.

4. To constitute constructive notice to bona fide purchasers, encumbrancers, or subsequent creditors, the instrument must be filed in the county to which the chattel is removed within ten days after actual notice of such removal, provided that in any event it shall not constitute constructive notice to such parties unless filed within thirty days after such removal.

5. The original filing of such security instrument shall cease to be constructive notice three years after the date of filing, but it may be repeatedly renewed for a period of one year by the filing of the obligor's written statement of the balance due upon the obligation.

6. The obligee shall be entitled to take possession upon twenty days notice given to the obligor after default, if this can be done without breach of the peace, unless the obligor before the expiration of such period shall have performed the defaulted obligation, and shall sell the chattel upon notice (as provided in this act) provided that if the instrument affirmatively shows that it was given for purchase money, the obligee shall not be required to sell the chattel unless either (a) Fifty per cent or more of the purchase price has been paid, or (b) the obligor shall make written request for such sale.

7 In any case if a sale is made, the obligor shall be entitled to the surplus after deducting costs and the balance due, and unless the instrument otherwise provide shall be liable for any deficiency

8. Where the chattels are delivered to or left in the possession of the obligor who is a dealer in such chattels, the filing of the se-

curity instrument shall not constitute constructive notice thereof to bona fide purchasers from the obligor in the regular course of business.

The idea of the last section is borrowed from the Uniform Trust Receipts Act, the others with slight modification from the other two Uniform Acts. Obviously a number of other provisions, most of which could be modeled after provisions of these Acts, would be required for a completed act.

The Uniform Acts are exceptionally well prepared. If any fault is to be found with them it is that they follow along traditional lines in their separation of such security devices which are closely related as a business matter. Possibly this was a necessary step in their evolution. But a Composite Act could now be prepared which would have obvious advantages over two separate statutes.